RECENT CASES.

CONSTITUTIONAL LAW—CIVIL RIGHTS—EQUAL PRIVILEGES—Managers of several theatres in New York refused admission to a newspaper dramatic critic, claiming that no person had a right to enter their theatres without their consent. At the instance of the critic a preliminary injunction was granted, restraining the managers from further refusing him admittance. Woolcott v. Shubert, 154 N. Y. Supp. 754 (1915).

The decision in this case rested upon the validity of a statute which provided that all persons within the jurisdiction should be entitled to "full and equal accommodations, advantages and privileges of any place of public accommodation, resort or amusement." Such places are so clothed with a public interest that they lose their status as private enterprises to the effect that all patrons may demand equal treatment. The principal case raised this point for the first time in New York.

Similar statutes have been enacted in various other States, generally for the purpose of preventing discrimination between whites and negroes. So, recovery of a specially provided penalty was allowed to a negress who was refused admission to a theatre upon presentation of a ticket procured for her by a white person. Baylies v. Curry, 128 Ill. 287 (1889); Joseph v. Bidwell, 28 La. Ann. 382 (1876), in accord. As to whether a skating rink is a public place of amusement there are decisions on both sides. See People v. King, 110 N. Y. 418 (1888); Bowlin v. Lyon, 67 Ia. 536 (1885), *contra*. A billiard room has been held not to come within the terms of such a statute. Com. v. Sylvester, 95 Mass. 247 (1866).

CRIMINAL LAW—LARCENY—MISLAID PROPERTY—A person while riding on a street car, picked up a package of money left on the seat, took it home and concealed it. *Held:* The package was not lost, but mislaid; it was still constructively in the possession of the owner, although its custody was in the trolley company; hence the taking with intent to appropriate was larceny. State v. Courtsol, 94 Atl. Rep. 973 (Conn. 1915).

There is a distinction in the criminal law between the taking of goods that are lost, and those merely mislaid. Where goods are lost, the taking, no matter with what intent, does not constitute larceny, 2 Russell on Crimes, 100; although this doctrine is considerably modified in some jurisdictions. Ransom v. State, 22 Conn. 153 (1852). It must be taken with great limitations and applies only where the finder really believes the goods to have been lost. Where an owner leaves an article, but later remembers where he left it and speedily seeks it, the property is not lost but mislaid and must be treated as being constructively in possession of the owner. State v. Courtsol, *supra*. So an article left on the counter of a store in the presence of the defendant is not lost, but mislaid, State v. McCann, 19 Mo. 249 (1853); or a purse dropped in a highway with owner's name written legibly in it. State v. Weston, 9 Conn. 527 (1832). But see *contra:* Porter v. State, Martin & Yerger, 226 (Tenn. 1827). The finder must act in good faith. If there be any mark on the article, or if it be found in a place where identification can be easily obtained, the article is mislaid and not lost, and if the finder fail to take steps necessary to locate the owner, but conceals or converts the article, he is guilty of larceny. People v. McGarren, 17 Wend. 460 (N. Y. 1837).

EVIDENCE—DECLARATIONS AGAINST INTEREST—In an action for damages by a passenger, who was injured in a wreck, against the railroad company, the latter, to show that negligence had not caused the accident, attempted, but failed to introduce a sworn statement made ten days after the wreck by a third person to the effect that he had wrecked the train. After the statement, but before the trial of this case, he was adjudged insane. *Held:* The refusal

to admit the sworn statement was error. Weber v. Chicago, *etc.*, Ry. Co., 151 N. W. Rep. 852 (Iowa, 1915).

The theory upon which declarations against interest are admitted as evidence is that of necessity. In England the declarant must be dead in order to meet the required condition of necessity. Harrison v. Blades, 3 Camp. 458 (Eng. 1813). In America, the great majority of cases follow the English rule that death is absolutely necessary. Currier v. Gale, 14 Gray, 504 (Mass. 1860); Lowry v. Moss, 1 Strob. 63 (S. C. 1846); Weber v. Ry. Co., *supra*, at page 869. In Buchanan v. Moore, 10 S. & R. 275 (Pa. 1823), death was sufficient, but nothing was said about insanity being insufficient. Absence from the jurisdiction is not sufficient in any jurisdiction. Brewster v. Doane, 2 Hill, 537 (N. Y. 1842).

On the other hand, a small minority of cases, supported by the textbook writers, hold that the necessity for introducing the statements is as great where the declarant has become insane or otherwise incapable of testifying as where he is dead, and therefore admit such statements. Wigmore on Evidence, Vol. 2, §1456. In Griffith v. Sauls, 77 Tex. 630 (1890), the declaration against interest of a living declarant was admitted when his physical condition prevented a deposition or an appearance. In Rothrock v. Gallagher, 91 Pa. 108 (1879), loss of memory because of ill-health and age was sufficient necessity to admit a declaration against interest. See also *dicta* in Jones v. Henry, 84 N. C. 324 (1881), and County of Mahaska v. Ingalls, 16 Iowa, 81 (1864).

EVIDENCE—DECLARATIONS AGAINST INTEREST—In an action on a promissory note, of which a married woman was maker and her husband, payee, the defense was that no liability attached to the maker, because she was an accommodation maker, and hence not liable according to the Act of June 8, 1893. *Held:* Declarations by the payee that his wife was an accommodation maker were excluded, because the declarations offered were not confined to the time during which the husband owned the notes. Farmers' and Merchants' Bank v. Donnelly, 247 Pa. 518 (1915).

One of the principal reasons for the admittance of declarations against interest is that, being against interest, there is no motive to misrepresent, but instead a strong guaranty of truth is furnished. 16 Cyc. 1219. Today the statement must be of a fact against the pecuniary or proprietary interest of the declarant. Halvorsen v. Moore, *etc.*, Lumber Co., 87 Minn. 18 (1902); Swan v. Morgan, 34 N. Y. Supp. 829 (1895). A penal interest is not sufficient in most States. People v. Hall, 94 Cal. 595 (1892); Com. v. Densmore, 12 Allen, 537 (Mass. 1866). *Contra:* Martin v. State, 33 Tex. Cr. 317 (1894). This distinction between a pecuniary or proprietary interest and a penal interest is a development of the first half of the last century. The early English cases made no such distinction. Hulet's Trial, 5 How. St. 1185 (Eng. 1660); Higham v. Ridgway, 10 East, 109 (Eng. 1808); Doe v. Robson, 15 East, 34 (Eng. 1812). However, in 1844, the rule was held not to include the statement of a fact subjecting the declarant to a criminal liability. Sussex Peerage Case, 11 Cl. & F. 109 (Eng. 1844). Wigmore criticizes the distinction and claims that it is not universally accepted by any means. Wigmore on Evidence, §1477.

The interest must likewise be an actual interest. Chamberlayne on Evidence, §2782; Clason v. Baldwin, 56 Hun, 326 (N. Y. 1890). The interest must not be prospective or contingent, as that of a former owner, Moehn v. Moehn, 105 Iowa, 710 (1898); or of a prospective heir. Morton v. Massie, 3 Mo. 482 (1834). If it can be shown *aliunde* that the declarant actually regarded it as for his interest, although actually against it, the declaration will be excluded. Taylor v. Witham, 45 L. J. Ch. 798 (1876).

EVIDENCE—FINGER PRINTS—PHOTOGRAPHIC REPRODUCTIONS—In a prosecution for burglary the State sought to introduce in evidence photographs of finger marks made at the place where the crime was committed, and impres-

sions made from defendant's fingers, in order to show that they were identical. *Held:* Such evidence is proper and admissible. State v. Connors, 94 Atl. Rep. 812 (N. J. 1915).

In principle, the admission of such evidence is based upon the theory that the evolution of the progressive and scientific tendencies of the age cannot be ignored in legal procedure, but that the law will allow evidence of these scientific processes which are the work of educated and skillful men in their various departments, leaving the weight and effect to be given to their results to the consideration of the jury. State v. Cerciello, 86 N. J. L. 314 (1914). Upon this theory it is that the testimony of an expert in handwriting is recognized, West v. State, 22 N. J. L. 212 (1849); that a photographic impression of the defendant may be used, Ruloff's Case, 45 N. Y. 213 (1871); that a comparison between the size and shape of the defendant's shoes and footprints found near the scene of a crime may be introduced, State v. Morris, 84 N. C. 756 (1841); Commonwealth v. Pope, 103 Mass. 440 (1869). Similarly it is not erroneous to permit evidence of the coincidence between the hand of the accused and the bloody print of a hand on the wall of a house where the crime was committed, State v. Miller, 71 N. J. L. 528 (1904); or testimony of the resemblance between spots on clothing produced and spots cut out of same clothing and used by experts in determining whether they were blood spots. State v. Miller, *supra.*

It must be remembered, however, that the condition upon which this testimony is received is that the finger prints, *etc.*, made by the defendant should have been made voluntarily by him; otherwise the production of such evidence would have the legal effect of compelling the defendant to testify against himself against his will. State v. Ah Chuey, 14 Nev. 79 (1879).

EVIDENCE—OTHER OFFENCES—After commanding the deceased to throw up his hands, the prisoner fired a shot, which proved fatal, and fled. Evidence of other robberies committed by the accused in the same locality and at approximately the same time, was introduced to show an intent to rob in the particular instance and thereby to convict of murder in the first degree, the homicide having occurred while committing an act of robbery. *Held:* The admission of the evidence was not error. Hiller v. People, 149 Pac. Rep. 250 (Colo. 1915).

Although all the cases are agreed that evidence of similar acts, even though criminal, may be introduced to prove the intent with which a particular act has been done, Crum v. State, 148 Ind. 401 (1897); State v. Johnson, 111 La. 935 (1904), this result has been reached by two lines of reasoning.

The majority of cases lay down the principle, as a general rule of criminal evidence, that on the trial of a person accused of crime, proof of a distinct, independent offence is inadmissible. People v. Molineux, 168 N. Y. 264 (1901). But when the evidence of the independent crime tends to prove motive, intent, identity of the accused or a common plan or scheme, then an exception to the general rule is recognized and the evidence is admitted. State v. Folwell, 14 Kan. 105 (1874); State v. Ward, 91 N. W. Rep. 898 (Iowa, 1902). However, where the facts constituting the offence and the very act itself are sufficient evidence of intent, further evidence of intent, as shown by the commission of similar offences is inadmissible. State v. Spray, 74 S. W. Rep. 846 (Mo. 1903).

On the other hand, Wigmore's general rule is that similar acts are admissible when they are relevant, *i. e.*, to show motive, intent, *etc.* If they are relevant, they are admitted in spite of their criminality. If they are irrelevant, there is also a further reason for excluding them in that they violate the Character Rule. People v. Tucker, 104 Cal. 440 (1894); Com. v. Robinson, 146 Mass. 571 (1888); Wigmore on Evidence, §§216, 302, 305. It will be seen that the ultimate result in the two classes of cases is practically the same. The difference is that Wigmore does not recognize a general rule excluding prior or subsequent criminal acts, other than the Character Rule, while the majority of courts have laid down such a rule as a general principle.

EVIDENCE—PHYSICAL EXAMINATION—DISCRETION OF THE COURT—In an action for damages for injuries arising out of an assault and battery, the court directed that the plaintiff should submit herself to a physical examination to ascertain the nature, extent and permanency of the injuries received. Upon her refusal to comply, a judgment of *non pros.* was entered against her. *Held:* It was within the discretion of the trial court to order a physical examination of the plaintiff. When exercised, however, its exercise is not ground for reversal unless manifestly abused. Scheffler v. Lee, 94 Atl. Rep. 907 (Md. 1915).

Jurisdictions are divided on the question as to whether courts have the power to order a plaintiff to submit his person to a physical examination. The federal courts have no such power, it never having been conferred on them by the Constitution or Laws of the United States. Union Pacific v. Borland, 141 U. S. 250 (1891). Some States hold that no such common law power has ever been conferred on them and that one's person is inviolate. Loyd v. Hannibal & St. Joseph R. R. 53 Mo. 509 (1873); Parker v. Enslow, 102 Ill. 272 (1882); but an unreasonable refusal to show one's injuries, when asked to do so, may be considered by the jury as bearing on one's good faith as in any other case of a party refusing to produce the best evidence in his power. Clifton v. U. S., 4 How. 242 (1846); Bryant v. Stilwell, 24 Pa. 314 (1855). The weight of authority in the State courts, however, seems to be in accord with our principal case. While the power to compel a physical examination is admitted, many cautions and limitations are suggested, and the general rule is that it cannot be demanded as a matter of right by a defendant, but the application is addressed to the sound discretion of the trial court, and such discretion will not be interfered with by an appellate court, unless manifestly abused. United Rys. v. Cloman, 107 Md. 690 (1908); Schroeder v. Chicago Ry. Co., 47 Ia. 375 (1877).

EVIDENCE — PRIVILEGED COMMUNICATIONS — PHYSICIANS — In a criminal prosecution, a witness was questioned concerning certain statements made by her to a doctor relative to her condition. *Held:* Such statements were admissible. In the absence of statute, communications to doctors in their professional capacity are not privileged. O'Brien v. State, 94 Atl. Rep. 1034 (Md. 1915).

At the common law, information imparted confidentially to a physician in the course of his attendance in a professional capacity was never privileged. Neither physician nor patient were entitled to refuse to testify to such information, however confidentially imparted. Duchess of Kingston's Case, 1 How. St. Tr. 643 (Eng. 1550); Rex v. Gibbons, 1 Car. & P. 97 (Eng. 1823). It was very early recognized that every reason that supports the privilege as to communications between attorney and client applied with equal force to the relationship existing between physician and patient. Greenough v. Gaskell, 1 Mylne & K. 98, 103 (Eng. 1833); so much so that the common law rule has been changed in many jurisdictions. See statutory provisions in various States, and note, 17 Am. St. Rep. 565.

But even under the statutes, the same essential elements are necessary to support the privilege as in the case of attorney and client. The consultation must be made with a professional physician or surgeon in the general acceptance of the words. This does not include a veterinary surgeon, Hendershot v. Western U. Teleg. Co., 106 Ia. 529 (1898); nor a druggist, Brown v. Hannibal & St. J. R. Co., 66 Mo. 597 (1877); nor a dentist, People v. De France, 104 Mich. 563 (1895); nor a consultation for purposes other than medical aid, Bower v. Bower, 142 Ind. 194 (1895); nor an autopsy, Harrison v. Sutter St. Ry. Co., 116 Cal. 156 (1897). The object of the privilege being to protect the patient, Hauk v. State, 148 Ind. 238 (1897), it is protected under any form and extends to consulting physicians. Renihan v. Dennin, 103 N. Y. 573 (1886); professional partners, Aetna Ins. Co. v. Deming, 123 Ind. 384 (1889); and covers all information imparted during professional employment. Finnegan v. Sioux City, 112 Ia. 232 (1900); but see *contra,* McGowan v. Supr. Ct., 104 Wis. 173 (1899).

HABEAS CORPUS—POWER OF COURT TO SUMMON JURY—DETERMINATION OF SANITY—In *habeas corpus* proceedings, on the question as to whether the prisoner had regained his sanity, the court, at the request of the prisoner, summoned a jury to hear the case. *Held:* A court has the inherent power, in *habeas corpus* proceedings, to summon a jury to aid it in reaching a conclusion on disputed questions of fact. People v. Hendrick, 109 N. E. 486 (N. Y. 1915).

While a trial by jury cannot be demanded by the prisoner or respondent in *habeas corpus* proceedings as a matter of right, the court may in its discretion order any controverted fact in the matter to be tried by a jury, providing that the judge does not, by so doing, intend to evade the responsibility of ultimately deciding the issue which has been raised, but simply intends to take the verdict of such jury by way of aid and advice in reaching his decision. This is true in all cases of doubtful fact. Graham v. Graham, 1 S. & R. 330 (Pa. 1815); such as doubt as to the proper person being a prisoner, Respublica v. Gaoler of Philadelphia County, 2 Yeates, 258 (Pa. 1797); or doubt as to whether a convict had violated his parole or not, People v. Burns, 28 N. Y. Supp. 300 (1894). The contrary doctrine prevails in some jurisdictions, where it is said that the court alone is the proper authority to pass on any and all questions involved. State v. Farlee, 1 N. J. L. 41 (1790).

LANDLORD AND TENANT — DESTRUCTION OF PREMISES — The defendant leased a barn to the plaintiff for five years. During the term the barn burned. The lessor rebuilt the barn, and on the completion thereof the lessee tendered his rent and demanded possession, but the lessor declined his offer and withheld possession of the new barn. During the interval between the date of the fire and the completion of the barn there was neither tender of rent nor demand therefor. *Held:* The lease of a building includes the land whereon it stands. Hence the obligation to pay rent and the reciprocal right of possession in the lessee continued after the fire. Gainer v. Griffith, 85 S. E. Rep. 713 (W. Va. 1915).

The well-established rule of the common law is that the liability of the tenant for the rent called for by the lease is in no way affected by the fact that buildings on the land leased are destroyed by some unforeseen casualty. Lincoln Trust Co. v. Nathan, 175 Mo. 32 (1903); Roberts v. Lynn Ice Co., 187 Mass. 402 (1905). This rule, however, has been disapproved in a few jurisdictions as bearing with undue severity upon the tenant. Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251 (1897); Whittaker v. Hawley, 25 Kan. 674 (1881). In South Carolina it has been repudiated in cases of destruction of the premises by the act of God or of the public enemies, but the common law rule still prevails in case of destruction by fire, since to throw the loss upon the lessor would tend to diminish the interest which the tenant has in protecting the property from fire. Coogan v. Parker, 2 S. C. 255 (1870). When only a room or a portion of a building is leased, it has been held that the common law rule does not apply, a distinction being drawn between the lease of apartments in a house and the house itself. McMillan v. Solomon, 42 Ala. 356 (1868).

PROPERTY—HIGHWAYS—ABANDONMENT—A certain highway had not been used for sixty years; land records made no mention of it for seventy years; it had become unpassable, except for pedestrians; it had been enclosed and its existence antedated the memory of the oldest witnesses. *Held:* If a highway ever existed it had been abandoned by long-continued disuse and had reverted to the grantees of the original dedicators. Newkirk v. Sherwood, 94 Atl. Rep. 982 (Conn. 1915).

The old common law doctrine still in force in many jurisdictions, is that there can be no loss of a public right in a highway by mere non-user, Smith v. State, 23 N. J. L. 130 (1851); and that a highway does not cease from non-user until discontinued by the proper authorities. Knowles v. Knowles, 25 R. I. 325 (1903). The doctrine has been modified, and it is often held that,

as a highway is nothing but an easement, the right to it can be extinguished by abandonment, Lye v. Lesia, 64 Mich. 16 (1887); Jeffersonville, M. & I. R. Co. v. O'Connor, 37 Ind. 95 (1871). On the question as to what constitutes abandonment by non-user, fifteen years adverse possession has been held sufficient to bar the public right. Litchfield v. Wilmot, 2 Root, 288 (Conn. 1795).. Similarly abandonment for thirty-six years, Jeffersonville, *etc.*, Ry. Co. v. O'Connor, *supra*. But the abandonment by non-user must be complete; mere partial abandonment by reason of diversion of traffic to other roads is not sufficient, Lewiston v. Proctor, 27 Ill. 414 (1862); nor will failure to use a road exactly as laid out for ten years bar the public from claiming it as originally established. Bannister v. O'Connor, 113 Ia. 541 (1901). A party purchasing land through which an unused road runs, of which he has no notice actual or of record, will be protected against the public, whose officers have been negligent in asserting their rights. Riley v. Brodie, 50 N. Y. Supp. 347 (1898).

SALES—"EXCHANGE" DISTINGUISHED FROM "SALE"—Land was sold for an agreed price, to be paid for by a stock of goods and certain fixtures. *Held:* This was a sale. Brunsvold v. Medgorden, 153 N. W. Rep. 163 (Iowa, 1915).

There is some conflict amongst the decisions as to the distinction between a sale and an exchange. Lucas v. County Recorder, 106 N. W. Rep. 217 (Neb. 1915). In a majority of jurisdictions the distinction is that in a sale a price is attached to the article sold, which may be received in money, Fuller v. Duren, 36 Ala. 73 (1860); or in a chattel at an estimated price, Pichard v. McCormick, 11 Mich. 68 (1862); whereas in an exchange one chattel is given for another, no price being attached, Thornton v. Moody, 24 S. W. Rep. 331 (Tex. 1893). In other jurisdictions it is an exchange if the consideration is paid in goods or merchandise, even though the articles are exchanged at an estimated price. Cooper v. State, 37 Ark. 412 (1881). That is, to have a sale the purchase price must be paid in money. Comm. v. Davis, 75 Ky. 240 (1876). Some jurisdictions refuse to draw a distinction between a sale and an exchange. Kennedy v. Sommerville, 68 Mo. App. 222 (1896); Howard v. Harris, 95 Mass. 297 (1864); where the court said that the legal distinction between a sale and an exchange of property was purely artificial.